No. 02-1812

Supreme Court, U.S.
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In The Supreme Court of the United States

RICHARD C. ANGINO; ALICE K. ANGINO; and KING DRIVE CORP.,

Petitioners,

v.

J. THOMAS VAN WAGNER; JEFFERY SMITH; RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the Appellate Court erred in affirming the Trial Court's alleged error in granting summary judgment based upon the ripeness doctrine as to Petitioners' entire civil rights action?

Whether the ripeness doctrine applies where a landowner alleges that a municipal body has passed an unconstitutional ordinance and has refused to amend it without the landowner presenting a formal administrative challenge under state law to the validity of the ordinance before the highest municipal decision making body?

Whether this Court should recognize futility as an exception to the ripeness doctrine?

CORPORATE DISCLOSURE STATEMENT

Respondent, Mette, Evans & Woodside, P.C., has no parent corporation nor does a publicly held company own any of the corporation's stock.

Respondent, Light-Heigel & Associates, Inc., has a parent corporation, AMPG, 430 East Main Street, Palmyra, Pennsylvania. No publicly held company owns more than 10 percent of the party's stock.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named Petitioners and Respondents are identified in the Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

This petition arises from a suit asserted by landowners under 42 U.S.C. § 1983 against a political sub-division, its governing body, solicitor, and engineer, commenced in the United States District Court for the Middle District of Pennsylvania. Petitioners challenged the enactment and interpretation of various ordinances and the manner in which each Respondent has treated their land use applications. Pet., App. at 7a.

Although the second amended complaint raises due process and equal protection claims, for purposes of this petition, detailing these factual allegations serves no purpose. Instead, in summary, that complaint alleges that commencing in 1988 the Middle Paxton Township Board of Supervisors enacted and later interpreted certain land use ordinances which had the effect of precluding Petitioners from selling lots and/or developing their resort (known as Felicita). Pet., App. at 67a-68a. Further, Petitioners allege that all Respondents pursued the goal of an "antidevelopment 'legally defensible' comprehensive plan." Pet., App. at 71a. To reach this goal, in Petitioners' view, the Respondents all participated in:

- Enactment of a steep slopes ordinance to reduce the number of lots that can be developed (Pet., App. at 69a);
- Enactment of other changes in the zoning ordinance to limit development (Pet., App. at 69a);
- Enactment of standards in the land use ordinance to limit length of cul-de-sacs, road grades and radii (Pet., App. at 74a);
- Misinterpretation and selective enforcement of ordinances (Pet., App. at 74a); and

- Deprivation of the highest and best use of Petitioners' land (Pet., App. at 72a).

On March 16, 1998, the parties to this action, excepting Respondent Light-Heigel which was not a party there, settled a previous action brought by the Petitioners. Pet., App. at 47a. That settlement resolved, among other things, previous claims brought by the Petitioners under similar theories against most of these same Respondents in the same District Court. Pet., App. at 47a. That written settlement agreement includes a general release and resulted in that action being dismissed with prejudice. Pet., App. at 47a-48a.

Petitioners filed the present action in January 2000. On April 4, 2002, the District Court, per A. Richard Caputo, United States District Judge, granted summary judgment in favor of all Respondents without prejudice. Pet., App. at 14a. On December 17, 2002, a three judge panel of the United States Court of Appeals for the Third Circuit affirmed, finding that "the District Court engaged in a thoughtful analysis." Pet., App. at 2a. On March 13, 2003, that Court denied Petitioners' petition for rehearing with suggestion for rehearing *in banc*. Pet., App. at 6a.

This petition makes abundant references to a document styled "Plaintiffs' Summary of Undisputed Facts" submitted to the District Court. Petitioners state, "The following facts are undisputed." Pet., at 4. The statement is untrue and misleading to this Court. Petitioners' summary of undisputed facts before the District Court was not in compliance with Rule 56.1 of the Local Rules Of The United States District Court For The Middle District Of Pennsylvania, which provides as follows:

> A motion for summary judgment filed pursuant to Fed.R.Civ.P. 56, shall be accompanied by a separate, short and concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried. *The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts, responding to the numbered paragraphs set forth in the statement required in the foregoing paragraph, as to which it is contended that there exists a genuine issue to be tried.* Statements of material facts in support of, or in opposition to, a motion shall include references to the parts of the record that support the statements. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Id. (emphasis added).

In responding to the motion for summary judgment, Petitioners were required to respond to the statement of material facts filed by the Respondents. They did not do so. Instead, they filed their own statement. Although that statement was in numbered paragraphs, they were not responsive to the statements of undisputed facts submitted by any of the Respondents. Therefore, the Respondents' statements were deemed admitted while Petitioner's were not. *See Williams Controls, Inc. v. Parente Randolph, Orlando, Carey & Associates*, 39 F. Supp.2d 517, 519 (M.D.Pa. 1999) (failure to file a separate, concise statement of facts responding to the numbered paragraphs set forth in moving party's statement of facts will be deemed admitted under Local Rule 56.1). Moreover, as an apparent consequence, both the District Court and the Court of

Appeals appear to have ignored Petitioners' so-called "Statement of Undisputed Facts."

Respondents submit that the facts relevant to this case are simply stated. Petitioners own approximately 700 acres in Middle Paxton Township, Dauphin County, Pennsylvania. Pet., App. at 47a. On that property are located a restaurant, an inn, an 18-hole golf course, an adjacent golf community, a lodge, and a spa. Pet., App. at 47a.

Over the years Petitioners have tried to develop their property by adding single-family residences and by expanding their resort. Pet., App. at 48a. Subsequent to the settlement on March 16, 1998, however, and until shortly before the District Court granted summary judgment, Petitioners never pursued any remedy available to them under Pennsylvania's Municipalities Planning Code, 53 P.S. § 10101 et seq., to challenge the validity of any ordinance, which they contend in their second amended complaint unduly and illegally restricts their land development. Pet., App. at 87a. They have never asked for variances from the applicable provisions of the zoning ordinance or pursued a validity challenge. Pet., App. at 87a-88a.

For example, Petitioners have complained at great length about the "steep slope" provisions of the zoning ordinance. Pet., App. at 69a. Not until shortly before the District Court granted summary judgment did Petitioners commence a validity challenge before the Respondent Board of Supervisors seeking a curative amendment from the "steep slope" provisions. Pet., App. at 105a-106a. The District Court granted summary judgment without prejudice, which provided the Petitioners the opportunity to proceed with the curative amendment process.

REASONS FOR DENYING THE WRIT

Petitioners raise three issues: 1) whether the Appellate Court erred in affirming the Trial Court's alleged error in granting summary judgment based upon the ripeness doctrine as to Petitioners' entire civil rights action; 2) whether the ripeness doctrine applies where a landowner alleges that a municipal body has passed an unconstitutional ordinance and has refused to amend it without the landowner presenting a formal administrative challenge under state law to the validity of the ordinance before the highest municipal decision making body; and 3) whether this Court should recognize futility as an exception to the ripeness doctrine. None of these issues satisfies the criteria under Rule 10 of this Court with respect to considerations governing review on certiorari. The Petitioners present no compelling reason for a grant of certiorari. They present no decision in conflict with the decision of any other Court on the same important matter nor does this decision depart "from the accepted and usual course of judicial proceedings." *Id.* Their first issue constitutes an alleged error of law. The second constitutes an attempt to revisit what is settled law in this Court. *See, e.g., Williamson Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). The third involves whether the law in the Ninth Circuit should become the law of this Court in an instance where the District Court has determine that the law in question does not apply factually.

I. The Circuit Court properly affirmed the grant of summary judgment, without prejudice, because Petitioners failed to avail themselves of state procedures for challenging Respondents' alleged actions and, thus, their claims were not ripe for adjudication.

Petitioners have articulated the initial question for review as being whether the Circuit Court erred in affirming the Trial Court's alleged error in granting summary judgment as to Petitioners' entire action based upon "ripeness" where that defense was first raised as an affirmative defense to Petitioners' second amended complaint and only as to additional civil rights violations resulting from the Township's adoption of its 2000 Zoning Ordinance. Pet., at i. While it is true that the Respondents did not raise ripeness (also referred to as the "doctrine of finality," *Williamson Planning Commission v. Hamilton Bank*, *supra*) as an affirmative defense in response to both the original and first amended complaints, it is undisputed that the Respondents did specifically plead ripeness in their respective responses to the second amended complaint. Respondent Light-Heigel's affirmative defenses to the second amended complaint stated, "Plaintiffs' *claims* are not *ripe* for disposition in this Court" (emphasis added). App. at 6b, paragraph 17, *infra*. Likewise, paragraph 14 of the affirmative defenses of the Respondent Middle Paxton Township parties to the second amended complaint stated, "Plaintiffs' *claims* are not *ripe* for hearing or disposition before this tribunal" (emphasis added). App. at 21b. While paragraph 19 of the affirmative defenses of the Respondent Ernico parties to the second amended complaint stated, "Plaintiffs' alleged *claims* are not *ripe* for hearing before this tribunal" (emphasis added). Pet., App. at 82a.

Contrary to Petitioners' assertion, all of the Respondents did plead the defense of ripeness as to all *claims* set forth in the second amended complaint and not "*only* as to *additional* civil rights violations resulting from the Township's *highest body's* adoption of its 2000 Zoning Ordinance." Petitioners' statement of the questions presented for review, Pet., at i. Consequently, the Respondents did not limit or restrict the defense of ripeness to the 2000 Zoning Ordinance but, rather, properly raised that defense as to *all claims* contained in the second amended complaint.

Petitioners represent that the "District Court rejected Defendants' 'ripeness' claim as to pre-November 2000 claims (117a-118a)." Pet., at 23. This is a misrepresentation of the record. On April 26, 2000, Respondents filed a joint motion to dismiss amended complaint and for a more definite statement. Pet., App. at 55a. In their supporting brief (App. at 24b-38b), filed May 8, 2000, Respondents argued that the amended complaint should be dismissed because, *inter alia*, Petitioners had failed to state claims under the Fifth and Fourteenth Amendments where there were adequate remedies under state law, the sole remedy being pursuant to 42 U.S.C.A. § 1983. The issue as raised and briefed by Respondents centered on a theory of failure to exhaust state remedies rather than ripeness, which theories are wholly distinct and separate. In that regard, the *Williamson* Court noted:

> While the policies underlying the two concepts overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and

> obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, *supra*, 473 U.S. at 193, 105 S.Ct. at 3120, 87 L.Ed.2d at 143. The Respondents did not raise ripeness in their motion to dismiss and the District Court did not address the issue of ripeness in denying the motion. The Respondents only raised ripeness as an affirmative defense in response to the second amended complaint. Therefore, the District Court was not asked to address nor did it address the issue of ripeness until presented with Respondents' motions for summary judgment following the filing of the second amended complaint.

Petitioners' attempt to raise some type of waiver argument ignores the essential nature of the doctrine of ripeness or finality. Ripeness is a product of the concept of justiciability and concerns whether the legal issue at the time presented is sufficiently concrete for decision. *United States v. Lightcap*, 567 F.2d 1226, 1232 (3d Cir. 1977). This Court has noted "that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, 113 S.Ct. 2485, 125 L.Ed.2d 38, n.18 (1993). A District Court may decide the ripeness issue upon motion without submitting it to a jury for factual findings. *Warner Cable Com. v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 205-206 (E.D. Pa. 1992). In fact, it has been recognized that considerations of ripeness are sufficiently important that Courts must raise the issue *sua sponte* even if the parties do not. *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 535 (3d Cir. 1988).

II. Petitioners were properly directed to participate in an administrative procedure to reach a final determination as to how the governing authority will apply its land use ordinance to Petitioners' real estate in order to satisfy the "ripeness" requirement.

Petitioners' claims in their complaint and amended complaints are essentially due process claims, that is, that the ordinances of Middle Paxton Township "go too far." *Williamson, supra*, 473 U.S. at 200, 105 S.Ct. at 3123, 87 L.Ed.2d at 147, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Thus, Petitioners are attacking the validity of those ordinances. In Pennsylvania the ultimate decision-makers at the administrative level on validity are: (a) the zoning hearing board or (b) the township supervisors in a curative amendment proceeding. Pennsylvania Municipalities Planning Code, § 916.1, 53 P.S. § 10916.1. Pet., App. at 10a. As noted by the District Court, Petitioners did not submit their claims to either body before starting suit. *Id.* In addition, under Pennsylvania law variances are granted by the political subdivision's zoning hearing board. Pennsylvania Municipalities Planning Code, § 909.1(a)(5), 53 P.S. § 10909.1(a)(5). Petitioners have never sought variances either. Pet., App. at 87a-88a.

As Petitioners admit, however, they eventually did challenge the validity of the ordinance by filing a curative amendment proceeding before the board of supervisors on February 27, 2002. Pet., at 23. That matter is still pending. In other words, Petitioners finally realized that they should follow Pennsylvania law with regard to obtaining a decision by the highest decision making body in the municipality.

Despite this, Petitioners continue their challenge of the dismissal of their action, stating:

> "Prior to this case the Third Circuit limited the 'ripeness' doctrine to administrative decisions of low level officials and not to ordinances adopted by the highest legislative bodies after legislative drafts, final drafts, meetings, and hearings."

Pet., at 23. Petitioners rely on four cases to support this argument: *New Hanover Township v. United States Corps of Army Engineers*, 992 F.2d 470 (3d Cir. 1993); *Taylor Investment, Ltd. v. Upper Darby Township*, 983 F.2d 1285 (3d Cir. 1993); *Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); and *Sameric Corporation of Delaware v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998). Pet., at 23-24, 29. None of these cases support Petitioners' position.

The seminal case on ripeness is *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, *supra*. There this Court considered whether, "petitioners' application of various zoning laws and regulations to respondents' property amounted to a 'taking' of that property." 473 U.S. at 175, 105 S.Ct. at 3111, 87 L.Ed.2d at 132. In *Williamson*:

> Respondent has submitted a plan for developing its property. . . . But . . . respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning

> ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%. [citations omitted]. The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements. Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations. [citation omitted]. Nevertheless, respondent did not seek variances from either the Board or Commission.

473 U.S. at 187-188, 105 S.Ct. at 3117, 87 L.Ed.2d at 139-140. Based on these facts, this Court found that the case was not ripe because:

> [A]s the court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe *until the government entity charged with implementing the regulations has reached a final decision* regarding the application of the regulations to the property at issue.

473 U.S. at 186, 105 S.Ct. at 3116, 87 L.Ed.2d at 139 (emphasis added). As Petitioners concede, ripeness is not the same as exhausting administrative remedies. Pet., at 26-27. As this Court noted:

> Resort to those procedures would result in a judgment whether the commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its

> subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

473 U.S. at 193, 105 S.Ct. at 3120, 87 L.Ed.2d at 143.

Though *Williamson* is primarily a takings case, it also analyzed the issues under a due process theory. This Court concluded:

> We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. *That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property*. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply

> for variances from the regulations. (emphasis added)

473 U.S. at 200, 105 S.Ct. at 3123, 87 L.Ed.2d at 148.

The District Courts and the Courts of Appeals have consistently followed *Williamson*, including the cases cited by Petitioners. Petitioners allege, "the Third Circuit panel decision in this case is in conflict with the prior decisions of the Third Circuit [citations omitted] as to what types of decisions are final and 'ripe.'" Pet., at 29. The first case cited is *New Hanover Township, supra*. There, the Corps of Army Engineers had granted a permit for a municipal waste landfill pursuant to a nationwide permit. The Court held that the case was not ripe and vacated the District Court's order granting the Corps' summary judgment motion. 992 F.2d at 472.

Ripeness was an issue because the landfill required a water quality certificate from the Pennsylvania Department of Environmental Resources (PADER). The Third Circuit concluded:

> A pragmatic view of the facts mandates a decision that this case is not ripe for review. First and foremost, the Corps' decision has no immediate impact on the Township. NHC may not proceed with its landfill project until it obtains a section 401 water quality certificate from the PADER. Thus, no one will experience any impact stemming from the Corps' decision until and unless PADER issues a water quality certificate.

992 F.2d at 472-473.

In short, because no decision had been made by the highest decision making body, the case was not ripe for adjudication. Contrary to Petitioners' assertion, the case

clearly does not stand for the proposition that the decision of a lower level official makes a case sufficiently ripe for federal consideration.

In *Taylor, supra*, plaintiff's tenant had obtained a use permit to operate a sports fitness center. Certain work on the building had to be performed. The tenant opened for business before the work was completed. The business was shut down and the permit revoked because the tenant had furnished false and misleading information on his application. 983 F.2d at 1285. Plaintiff sued and, on appeal, the Circuit Court articulated the process plaintiff should have followed:

> Plaintiffs did not reapply for a use permit, appeal the revocation to the Township Zoning Board, or seek a variance or special exception to the Township's zoning ordinances. Each of these options was available to plaintiffs under the Township's zoning ordinance and Pennsylvania's Municipal Planning Code. The zoning hearing board has exclusive jurisdiction to render a "final adjudication" regarding any decision of the zoning officer, such as revocation of a use permit. Pa.Stat.Ann. tit. 53, § 10909.1(a)(3). The zoning hearing board also has exclusive jurisdiction to grant variances and special exceptions to the zoning ordinance. Ordinance § 1600; *see also* Pa.Stat.Ann. tit. 53, §§ 10910.2 & 10912.1. The zoning hearing board would have been required to hold a hearing on plaintiffs' appeal or request for a variance or special exception within sixty days of filing and to render a decision within forty-five days of the hearing. Pa.Stat.Ann. tit. 53, § 10908(1.2). Failure to take action on plaintiffs' request for relief would have resulted in deemed approval of the request. Pa.Stat.Ann. tit. 53, § 10908(9).

983 F.2d at 1285.

After a careful analysis of the facts, including a discussion of *Williamson*, the Third Circuit disposed of plaintiff's due process claim holding:

> In *Williamson* and *MacDonald*, [*Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285, *reh'g denied*, 478 U.S. 1035, 107 S.Ct. 22, 92 L.Ed.2d 773 (1986)], however, the Supreme Court did not ignore the fact that certain land-use decisions may cause injury. Rather, in the face of potential constitutional injuries, the Court held that the local authority should be given the opportunity to fully and finally determine the scope of the injury before federal claims ripen . . . although plaintiffs may, at some point, have a mature and colorable claim because of the township's actions – assuming they had a property interest in the permit at all – *Williamson* and *MacDonald* require that plaintiffs allow local authorities to act with finality under the zoning ordinance before pursuing a due process claim.

983 F.2d at 1294.

The Third Circuit also disposed of the plaintiff's equal protection claim by stating:

> Like a takings claim, the injury – dissimilar and irrational treatment – ripens only after the zoning hearing board takes final and definitive action through its variance or review procedures. Because plaintiffs resorted to neither, their equal protection claim is not ripe for judicial review.

983 F.2d at 1295.

Petitioners' third case, *Acierno*, *supra*, is a case decided under Delaware, not Pennsylvania, law. There, the

applicant twice submitted plans to the County Development and Licensing Division. They were denied. Neither was appealed. The applicant then filed suit in the U.S. District Court. The defendants appealed the denial of their motion for summary judgment and the granting of plaintiffs' motion for injunction to the Third Circuit. The issue was whether a final decision had been made.

Contrary to Petitioners' position, *Acierno* does not stand for the proposition that a cause of action is ripe upon a decision by a lower level official. Rather, the Court held:

> We agree the County has made a final decision with respect to plaintiffs' development plans. Plaintiff submitted three plans depicting commercial development on the M-1 portion of the property. The Department of Planning and the County Council accepted those plans, which are final decisions under state law and the county zoning ordinance.

6 F.3d at 975.

Obviously, in *Acierno* the decision was made at county level, not by some lower level functionary.

Petitioners' final case, *Sameric*, *supra*, is quoted at length in the Petition. Pet., at 24-25. The quoted material cited by Petitioners does not support their position. That quotation refers to a "*Final determination* regarding how to construe the applicable ordinances and apply them to a particular property." Pet., at 25. 142 F.3d at 597 (emphasis added). The *Sameric* Court concluded, "that the Department of Licenses denial was *not* the city's final determination of Sameric's rights to a demolition permit under the ordinances." 142 F.2d at 597 (emphasis added).

Clearly, the District Court was correct when it cited *Sameric* and concluded that Petitioners' claims were not ripe. Pet., App. at 7a-14a. The Third Circuit was, therefore, correct in affirming. It follows that this Court should deny the Petition.

III. "Futility" does not apply as an exception to the ripeness doctrine in the instant case because the record does not support that exception.

The Third Circuit has not adopted the futility rule in land use cases. Simply stated, that rule is that if the record in a given case demonstrates the futility of pursuing the matter to a final decision the issue may be ripe for disposition. The two lead cases on this subject appear to be from the Ninth Circuit, *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989) and *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990), *aff'd on other grounds*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

In *Hoehne*, the District Court had dismissed the plaintiffs' complaint as premature. The Ninth Circuit reversed finding that the actions of the governmental body in denying a subdivision application and then rezoning the land to make it impossible for the owners to subdivide constituted a sufficient final decision so as to make any further applications to the governmental body futile.

In *Del Monte Dunes*, the applicant submitted four variations of the same plan for approval. Each time they were rejected. On three occasions the planning commission made suggestions or the City suggested changes and when plans were modified to meet these suggestions, they were still rejected. The *Del Monte Dunes* Court stated the

requirements for meeting its futility exception to the finality rule as follows:

> The taking component of an as applied claim is not ripe until the local government issues a final decision on the application of land use regulations to the affected property. *Id.* The cases of this circuit and the Supreme Court have identified two areas of concern that illuminate and define the finality requirement. *Finality first requires the rejection of development formally sought by the landowner. At a minimum, the landowner must submit one formal development plan and seek a variance from any regulations barring the development proposed in the plan.* Finality also requires the local government to determine authoritatively the type and intensity of development that land use regulations will allow on the subject property; such a determination helps a court to evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation. Thus, a landowner may need to resubmit modified development proposals that satisfy the local government's objections to the development as initially proposed.
>
> This circuit recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. Under this exception, the resubmission of a development plan or the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile. *The landowner bears the burden of establishing, by more than mere allegations, the futility of pursuing any of the steps needed to obtain a final decision.* Moreover, before claiming the exception, the landowner must

> submit at least one development proposal and one application for a variance if meaningful application and submission can be made.

920 F.2d at 1502 (citations omitted) (emphasis added).

Petitioners could not meet this test before the District Court. They had not submitted any plan that has been denied because of the provision of the township's zoning ordinance, let alone repeated plans. They had not asked for a variance. As the lower Court concluded, "Even if this doctrine is recognized in this circuit, Plaintiffs have not met the *Del Monte* requirements." Pet., App. at 12a. In short, even if this Court adopts the *Hoehne* and *Del Monte Dunes'* futility exception, it does not apply to the Petitioners here.

Evidently, Petitioners believe that they can meet the futility standard by citing the letters written by them to the Respondent Supervisors. The "Statement of Facts" in the Petition lists and quotes extensively from five obviously self-serving letters written by Petitioner Richard Angino in 2000 and 2001 accusing the Respondent Supervisors of enacting a number of illegal ordinances. Pet., at 15-21. Petitioners also quote a November 9, 2001 reply from the Respondent Solicitor, presumably to demonstrate that further efforts to file a plan or seek variances, or more importantly, to challenge validity, would be pointless. Pet., at 21.

As *Del Monte Dunes* states:

> This circuit recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. . . . Under this exception, *the resubmission of a development*

> *plan or the application for a variance* from prohibitive regulations may be excused if those actions would be idle or futile.

920 F.2d at 1501 (emphasis added). Letters are not a sufficient substitute for actually submitting a plan or a request for a variance and having official action taken. As *Del Monte Dunes* also states:

> The landowner bears the burden of establishing, *by more than mere allegations*, the futility of pursuing any of the steps needed to obtain a final decision.

920 F.2d at 1501 (emphasis added).

In view of the foregoing, consideration of whether this Court should adopt the "futility" exception to land use cases would not alter the outcome to Petitioners' claims.

CONCLUSION

The Petition should be denied for the reasons and authority stated above.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD C. ANGINO, ALICE K. ANGINO, and KING DRIVE CORP., Plaintiffs,	:	CIVIL ACTION – LAW
	:	No. 1:CV 00-0086
	:	Judge Caputo
v.	:	
J. THOMAS VAN WAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township; MIDDLE PAXTON TOWNSHIP; JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, P.C.; MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer; and LIGHT-HEIGEL & ASSOCIATES, INC., Defendants.	:	

ANSWER OF LIGHT-HEIGEL & ASSOCIATES, INC. TO SECOND AMENDED COMPLAINT

1-13. Admitted on information and belief except that Light-Heigel & Associates, Inc. (Light-Heigel) has no knowledge of whether the action is brought against individuals in both personal and official capacities or whether any person named in the Second Amended Complaint is acting within the scope of his or her employment.

14. Admitted.

15. Admitted.

16-79. Denied. As Plaintiffs well know, Light-Heigel was not involved in any of the following:

(a) The prior lawsuit.

(b) The preparation and enactment of the 1998 Comprehensive Plan.

(c) The preparation and enactment of the 2000 Zoning Ordinance.

(d) The preparation and enactment of the Steep Slope Ordinance adopted in 1988 and amended in 1991.

(e) Minimum lot size requirements.

(f) Cul-de-sac requirements.

(g) Road grade percentage.

By way of further answer, as to Paragraph 71, Light-Heigel was not found guilty of bad faith by Judge Turgeon in the Court of Common Pleas of Dauphin County.

80. Denied that Light-Heigel has engaged in any illegal, discriminatory, constitutionally violative practice at any time.

(a)-(j) These allegations are directed at other Defendants and not at Light-Heigel.

COUNT I

81. Light-Heigel incorporates its answers to Paragraphs 1 through 80 by reference.

82. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any federally protected rights, constitutional due process, equal protection or other property rights granted by the Federal and State Constitutions and their laws.

83. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any federally protected rights in either an individual or official capacity because Light-Heigel is a private entity and was incapable of acting under color of state law. Denied that any conduct on the part of Light-Heigel has caused Plaintiffs any damages.

84. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any of the additional damages described in this paragraph.

85. Denied that any conduct on the part of Light-Heigel has deprived Plaintiffs of any constitutionally protected or any other rights and, therefore, denied that any conduct on the part of Light-Heigel is outrageous, intentional, or punitive or was taken with reckless indifference to Plaintiffs' rights.

86. Denied that any conduct on the part of Light-Heigel has forced Plaintiffs to spend attorney time or incur expense in this or any other action.

WHEREFORE, Light-Heigel & Associates, Inc. requests that as to it Plaintiffs' Second Amended Complaint be dismissed.

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a cause of action upon which they may obtain relief.

2. All denials of approval of land development and subdivision plans submitted by Plaintiffs with which Light-Heigel has any connection resulted from Plaintiffs' failure to comply with the applicable ordinances and other laws governing zoning and development in Middle Paxton Township.

3. Light-Heigel was not a party to the prior lawsuit described in Paragraph 20 of the Second Amended Complaint.

4. Light-Heigel was not a party to the Settlement Agreement of the prior lawsuit described in Paragraphs 21 and 22 of the Second Amended Complaint.

5. Light-Heigel is not and cannot be in violation of any of the provisions of the Settlement agreement described in Paragraphs 21 and 22 of the Second Amended Complaint.

6. As Township Engineer, Light-Heigel has no power to approve or deny land development and subdivision plans, to enact or not enact ordinances, or to impose any policies on the Township and its Board of Supervisors.

7. Light-Heigel is a private entity and, therefore, cannot and has not acted under color of state law.

8. Light-Heigel did not participate in the preparation and enactment of an amendment to the Middle Paxton Township Zoning Ordinance in 1988 defining steep slopes as described in Paragraph 33 of the Second Amended Complaint.

9. Light-Heigel did not participate in the preparation and enactment of an amendment to the Middle Paxton Township Zoning Ordinance in 1991 with regard to defining steep slopes and requiring certain minimum lot areas in connection therewith as alleged in Paragraph 34 of the Second Amended Complaint.

10. Light-Heigel did not participate in the preparation and enactment of any amendments to the Middle Paxton Township Zoning Ordinance with respect to minimum lot area as described in Paragraph 35 of the Second Amended Complaint.

11. Light-Heigel did not participate in the preparation and enactment of a Comprehensive Plan in 1998 by Middle Paxton Township.

12. Light-Heigel did not participate in the preparation and enactment of a Zoning Ordinance in 2000 by Middle Paxton Township.

13. Light-Heigel did not participate in the preparation and enactment of any amendments to the Middle Paxton Township Zoning Ordinance with respect to minimum road grade percentage.

14. Some or all of Plaintiffs' claims are barred by the applicable statute of limitations.

15. Some or all of Plaintiffs' claims are barred by the provisions of the Settlement Agreement of the prior lawsuit.

16. Plaintiffs have failed to exhaust available state remedies.

17. Plaintiffs' claims are not ripe for disposition in this Court.

18. At all times, Light-Heigel has properly carried out its duties as Township Engineer pursuant to the terms of the Second Class Township Code.

WHEREFORE, Light-Heigel & Associates, Inc. respectfully requests that as to it Plaintiffs' Second Amended Complaint be dismissed.

HARTMAN UNDERHILL & BRUBAKER LLP

By: /s/ Christopher S. Underhill
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD C. ANGINO, ALICE K. ANGINO and KING DRIVE CORP., Plaintiffs	CIVIL ACTION – LAW
v.	NO. 1:CV-00-0086
J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO, METTE, EVANS & WOODSIDE, P.C., MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer, and LIGHT-HEIGEL & ASSOCIATES, INC., Defendants.	JUDGE CAPUTO JURY TRIAL DEMANDED

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP and MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer, TO PLAINTIFFS' SECOND AMENDED COMPLAINT

1. Denied.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted with correction. The Defendant's first name is spelled "Jeffery".

8. Admitted.

9. Admitted in part, denied in part. To the extent it is being alleged that the Defendant Supervisors are liable upon the claims asserted in either their personal or official capacities, said allegations are specifically denied. The remaining allegations are admitted.

10. Admitted in part, denied in part. To the extent it is being alleged that Defendant Davis is liable upon the claims asserted in either her personal or official capacity, said allegations are specifically denied. The remaining allegations are admitted.

11. Admitted.

12. Admitted in part, denied in part. It is denied that Defendant Ernico is the Township solicitor. To the contrary, at all times relevant hereto, Defendant Ernico was the solicitor to the Board of Supervisors of Middle Paxton Township. The remaining allegations are admitted.

13. The allegations are conclusions of law and/or fact to which no answer is required.

14. The allegations are directed to a party other than the answering Defendants and, therefore, no answer is required.

15. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

16. Admitted.

17. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

18. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

19. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

20. Denied. The Amended Complaint filed to No. 1-CV-97-1265, attached as an exhibit to the original Complaint and Amended Complaint in the instant action, is a written document which speaks for itself and, therefore, any attempt to characterize, summarize, paraphrase or interpret it is denied.

21. Admitted.

22. Denied. The Settlement Agreement is a written document which speaks for itself and, therefore, any attempt to characterize, summarize, paraphrase or interpret it is denied.

23. Denied.

24. Admitted in part, denied in part. It is admitted that the Supervisors of Middle Paxton Township (hereinafter "the Supervisors") have adopted zoning and land development amendments, the 2000 Zoning Ordinance, and a

proposed new Subdivision Ordinance. The remaining allegations are denied.

25. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

26. Admitted.

27. Admitted.

28. Admitted in part, denied in part. It is admitted that Stan Custer obtained approval from the Township to utilize an on-site sewage package treatment plant. The remaining allegations are denied. By way of further answer, Middle Paxton Township (hereinafter "the Township") neither approved or disapproved the slope of driveways, and it is believed that the Township did not approve construction of a public access road in excess of 10%.

29. Admitted in part, denied in part. It is admitted that Cameron Geisel obtained a waiver from the 500 foot cul-de-sac limitation. The remaining allegation is denied as the 1,280 foot figure is the combined length of two (2) streets.

30. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations as the phrases "relatively near" and "similar mountainside terrain" are too indefinite.

31. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

32. Denied. The Dresdner Comprehensive Plan is a written document which speaks for itself and any attempt

to characterize, summarize, paraphrase or interpret it is denied.

33. Admitted in part, denied in part. It is admitted that the Township adopted a steep slope ordinance in 1988. The remaining allegations are denied as they purport to characterize, summarize, paraphrase or interpret written documents, i.e. the 1988 steep slope ordinance and the Dresdner Comprehensive Plan, which speak for themselves. The remaining allegations are denied.

34. Admitted in part, denied in part. It is admitted that the Township adopted an ordinance which defined steep slopes as being 12%, 15% and 18% and which required three, five and ten acres, respectively, for each lot. The remaining allegations are denied.

35. Denied. The allegations relate to written documents, i.e. ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

36. Admitted.

37. Denied. The allegations relate to written documents, i.e. questionnaires, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

38. Admitted in part, denied in part. It is admitted that the Township adopted a Comprehensive Plan in 1998 and a Zoning Ordinance. The remaining allegations are denied.

39. Denied.

40. Admitted.

41. Denied. The answering Defendants are unable to admit the allegation as the map referred to has not been specifically identified.

42. Denied. The answering Defendants are unable to admit the allegation as the map referred to has not been specifically identified.

43. Denied. The answering Defendants are unable to admit the allegation as the map referred to has not been specifically identified.

44. Denied.

45. Admitted in part, denied in part. It is admitted that the Supervisors, as the governing body of the Township, are vested with the sole authority to adopt and amend comprehensive plans, including the establishment of zoning districts and zoning boundary lines, by resolution in accordance with the Municipalities Planning Code. The remaining allegations are denied.

46. Admitted in part, denied in part. It is admitted that the 2000 Zoning Ordinance resulted in some portion of Plaintiffs' property being classified as agricultural/residential low density. The remaining allegations are denied.

47. Denied. The allegations relate to written documents, i.e. ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied. The remaining allegations are denied.

48. Denied. The allegations concerning the Municipalities Planning Code's recommendations are conclusions of law and/or fact to which no answer is required and they are, therefore, denied. The remaining allegations relate to

written documents, i.e. comprehensive plans and zoning ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

49. Denied. The allegations relate to written documents, i.e. comprehensive plans and zoning ordinances, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied. The remaining allegations are denied.

50. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

51. Admitted in part, denied in part. It is admitted that the 2000 Zoning Ordinance contains a steep slope overlay which requires three acres for 12% slopes, five acres for 15% slopes and ten acres for 18% or greater slopes. The remaining allegations are denied.

52. Denied. The Dauphin County 1992 Comprehensive Plan is a written document which speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

53. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

54. Denied.

55. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

56. Denied.

57. Denied.

58. Admitted in part, denied in part. It is admitted that Defendant Ernico authored the letter of October 27, 1997 in response to the letter of Charles Guttenplan, Exhibits "A" and "B", respectively, to the Second Amended Complaint. The letters are written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

59. Denied. The 1998 and the 1987 Comprehensive Plans are written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

60. Denied. The 1992 Comprehensive Plan of Dauphin County is a written document which speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

61. Denied. The Comprehensive Plan and Zoning Ordinance of Lower Paxton Township are written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

62. Denied. The allegations relate to various written documents, i.e. zoning ordinances of contiguous townships, which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

63. Denied. The allegations relate to various written documents which speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

64. Admitted in part, denied in part. It is admitted that the steep slope provisions in the Township's 2000 Zoning

Ordinance is an overlay. The remaining allegations are denied.

65. Denied. It is specifically denied that the answering Defendants have acted in a manner that is arbitrary, capricious and/or discriminatory over the past decade and/or through the 1998 Comprehensive Plan and 2000 Zoning Ordinance. The remaining allegations are conclusions of law and/or fact to which no answer is required.

66. Denied. The answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations and proof is demanded.

67. Denied. The allegations are conclusions of law and/or fact to which no answer is required.

68. Denied. By way of further answer, the 2000 Zoning Ordinance defines "resort".

69. Denied.

70. Denied. It is specifically denied that the answering Defendants have singled out or discriminated against the Plaintiffs.

71. Denied. The allegation relates to an Order issued by Judge Turgeon and a subsequent decision of the Commonwealth Court which are written documents that speak for themselves and any attempt to characterize, summarize, paraphrase or interpret them is denied.

72. Denied. The allegation relates to a determination by the Arbitrator which is a written document that speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

73. Denied. The allegation relates to a determination of the Court of Common Pleas of Dauphin County which is a written document that speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied. By way of further answer, the order was subsequently withdrawn.

74. Denied. It is denied that the district justice reversed the closure, but rather simply found Plaintiff Richard Angino not guilty of a summary offense, a determination from which the Township had no right of appeal.

75. Admitted in part, denied in part. It is admitted that the Supervisors brought a petition against Plaintiffs for breaching the Settlement Agreement. The remaining allegations relate to a written document, i.e. the court's Order, which is a written document that speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it is denied.

76. Denied.

77. Denied.

78. Denied.

79. Admitted in part, denied in part. It is admitted that the Supervisors have, on occasion, elected not to follow the recommendations of the Township's Planning Commission on matters related to various plans that have been submitted to it for approval due to non-compliance with applicable ordinances. The remaining allegations are denied.

80. Denied. It is specifically denied that the answering Defendants have acted illegally toward, have discriminated against or have violated the constitutional rights of the plaintiffs.

a.) Denied;

b.) Admitted in part, denied in part. It is admitted that the Supervisors have refused to consider a waiver of Straw Hollow Road width to 16 or 18 feet because the Plaintiffs agreed to a different width in the Settlement Agreement. The remaining allegation is denied;

c.) Admitted in part, denied in part. It is admitted that the Supervisors have required a width of 22 feet for the existing Straw Hollow Road rather than a width of 16 or 18 feet because the Plaintiffs agreed to the 22 foot width in the Settlement Agreement. It is denied that there is, or should be, any correlation between the width of pre-existing roads and the width of Straw Hollow Road;

d.) Admitted in part, denied in part. It is admitted that the Township has a budget surplus. The remaining allegations are denied. The allegations concerning the 1998 Comprehensive Plan are denied as they relate to a written document which speaks for itself and any attempt to characterize, summarize, paraphrase or interpret it are denied. By way of further answer, the Comprehensive Plan contains an Action Plan, a portion of which relates to highways and circulatory systems, with a recommendation that it be re-evaluated annually. Furthermore, the Township has undertaken to repave and improve certain Township roads during the year 2001 and is attempting to obtain State funds for other such improvements;

e.) Denied. It is admitted, however, that the 2000 Zoning Ordinance requires road widths which may be generally wider than some existing state and township roads within the Township;

f.) Denied. It is specifically denied that the Supervisors have used the Comprehensive Plan to preclude development;

g.) Denied. It is admitted, however, that the Supervisors granted a waiver to Verizon on or about August 2, 2001. It is denied that Defendant Mette Evans represented Verizon in that application, although it had represented Verizon in other matters, which fact was disclosed. It is further denied that Defendant Ernico participated in any way at the hearing on the application. Moreover, it is denied that Verizon's application was substantially similar to any application submitted by the Plaintiffs;

h.) Denied as stated. It is admitted, however, that Defendant Van Wagner stated that permitting the *specific* waivers requested by the Plaintiffs at the August 2, 2001 meeting would not be appropriate because he had never voted to approve the same waivers when requested by others. It is denied that Defendant Van Wagner made a blanket or general statement that waivers should never be granted or that waivers should never be granted to the Plaintiffs;

i.) Denied as stated;

j.) Denied as stated.

42 U.S.C. §1983
Due Process – Equal Protection
Pennsylvania Constitutional Violations

81. The answers set forth above in Paragraphs 1 through 80 are incorporated herein by reference.

82. Denied. It is specifically denied that the answering Defendants have acted to deprive the Plaintiffs of their federally protected constitutional due process and equal protection and other property rights.

83. Denied. It is specifically denied that the answering Defendants have acted to deprive the Plaintiffs of their federally protected rights. The remaining allegations are denied on the basis that the answering Defendants are without knowledge or information sufficient to form a belief as to the truth thereof and proof is demanded.

84. Denied. It is specifically denied that the answering Defendants have engaged in conduct to deprive Plaintiffs of their federally protected rights. The remaining allegations are denied on the basis that the answering Defendants are without knowledge or information sufficient to form a belief as to the truth thereof and proof is demanded.

85. Denied. It is specifically denied that the answering Defendants have engaged in conduct that is outrageous, intentional, punitive and undertaken with reckless indifference toward the Plaintiffs' rights.

86. Denied. It is specifically denied that the answering Defendants have violated Plaintiffs' civil rights. The remaining allegations are denied on the basis that the

answering Defendants are without knowledge or information sufficient to form a belief to the truth thereof and proof is demanded.

WHEREFORE, Defendants J. Thomas Van Wagner, Jeffery Smith and Richard Peffer, individually and as Supervisors of Middle Paxton Township, Middle Paxton Township, and Mary Jane Davis, individually and as Middle Paxton Township Codes Enforcement Officer, demand judgment in their favor and against Plaintiffs.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Second Amended Complaint fails to set forth causes of action upon which relief may be granted against the answering Defendants.

2. The answering Defendants have not deprived or engaged in conduct intended to deprive Plaintiffs of their federally protected rights.

3. The answering Defendants have not deprived or engaged in conduct intended to deprive the Plaintiffs of their state protected rights.

4. The answering Defendants have not conspired or engaged in conduct, together or with others, intended to deprive Plaintiffs of their federally or state protected rights.

5. The answering Defendants have not violated or breached the terms of the Settlement Agreement referenced in the Second Amended Complaint.

6. The answering Defendants have not imposed arbitrary, capricious or unreasonable conditions upon the development of Plaintiffs' land.

7. The answering Defendants have acted in accordance with applicable ordinances, the Municipalities Planning Code, and sound engineering and land development principles in imposing conditions upon the development of Plaintiffs' land.

8. Plaintiffs have adequate remedies under state law which they have failed to exhaust.

9. Plaintiffs' Second Amended Complaint fails to set forth any racial or class-based animus to support a cause of action under 42 U.S.C. §1905(3).

10. The Second Amended Complaint fails to set forth causes of action upon which punitive damages may be awarded.

11. Punitive damages may not be awarded against Middle Paxton Township, the Middle Paxton Board of Supervisors, the individual Supervisors or the Codes Enforcement Officer in their official capacities.

12. The Individual Defendants are entitled to qualified immunity.

13. Plaintiffs lack standing to assert any claims against the answering Defendants.

14. Plaintiffs' claims are not ripe for hearing or disposition before this tribunal.

15. As a result of the Settlement Agreement referenced in the Second Amended Complaint, the answering Defendants are released from all or some of the claims for damages.

16. Some or all of Plaintiffs' claims are barred by the applicable statutes of limitations.

17. Defendant Mary Jane Davis, as the Codes Enforcement Officer, had no power or authority to enact zoning ordinances, subdivision and land development ordinances or comprehensive plans.

18. Defendant Mary Jane Davis, as the Codes Enforcement Officer, had no power or authority to grant waivers or exceptions or to approve or disapprove land development and/or subdivision plans submitted by the Plaintiffs.

19. Defendant Jeffery Smith did not become a member of the Middle Paxton Township Supervisors until January 1998 and he participated in his first official meeting as a Supervisor on January 5, 1998.

20. Defendant Jeffery Smith had no power or authority to enact zoning ordinances, subdivision and land development ordinances or comprehensive plans prior to January 5, 1998.

21. Defendant Jeffery Smith had no power or authority to grant waivers or exceptions or to approve or disapprove land development and/or subdivision plans submitted by the Plaintiffs prior to January 5, 1998.

22. The answering Defendants reserve the right to amend their affirmative defenses in accordance with applicable law, rules of procedure and the Court's Case Management Plan.

WHEREFORE, Defendants J. Thomas Van Wagner, Jeffery Smith and Richard Peffer, individually and as Supervisors of Middle Paxton Township, Middle Paxton Township, and Mary Jane Davis, individually and as

Middle Paxton Township Codes Enforcement Officer, demand judgment in their favor and against Plaintiffs.

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ATTORNEYS FOR DEFENDANTS J. THOMAS VAN WAGNER, JEFFERY SMITH, RICHARD PEFFER, individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP and MARY JANE DAVIS, individually and as Middle Paxton Township Codes Enforcement Officer

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD C. ANGINO, ALICE K. ANGINO AND KING DRIVE CORP.,	:	**NO. 1:-CV-00-0086**
	:	**JUDGE**
	:	**YVETTE KANE**
Plaintiffs.	:	
v.	:	
J. THOMAS VANWAGNER, JEFFREY SMITH, RICHARD PEFFER, Individually and as Supervisors of Middle Paxton Township, MIDDLE PAXTON TOWNSHIP, JEFFREY A. ERNICO and METTE, EVANS & WOODSIDE, PC., MARY JANE DAVIS, Individually and as Middle Paxton Township Codes Enforcement Officer and LIGHT-HEIGEL & ASSOCIATES, INC.,	:	
Defendants	:	

BRIEF IN SUPPORT OF JOINT MOTION OF DEFENDANTS VANWAGNER, SMITH, PEFFER, MIDDLE PAXTON TOWNSHIP, ERNICO, METTE, EVANS & WOODSIDE, P.C. AND DAVIS TO DISMISS AMENDED COMPLAINT AND/OR FOR A MORE DEFINITE STATEMENT

(Filed May 8, 2000)

I. PROCEDURAL HISTORY AND STATEMENT OF FACT:

On or about January 17, 2000, Plaintiffs commenced this civil action by filing a Complaint in which they

attempted to assert various claims under the Fourteenth Amendment of the United States Constitution, the Fifth Amendment of the United States Constitution, 42 U.S.C.A. § 1983, 42 U.S.C.A. § 1985(3) and unspecified pendent state law claims. These claims arise out of a land use dispute that was previously before this court at civil action number 1:CV-97-1265. That case was settled in 1998. At that time, the parties agreed on an extensive Settlement Agreement, a copy of which was attached to the Complaint in this action.

In response to the Complaint, Defendants VanWagner, Smith, Peffer, Middle Paxton Township, Ernico, Mette, Evans & Woodside, P.C. and Davis filed a Joint Motion to Dismiss some of the claims set forth in the Complaint and for a More Definite Statement. Plaintiffs then filed an Amended Complaint, in accordance with F.R.C.P. 15, in which they have confined their claims under § 1983 and for civil conspiracy to violate their constitutional rights. Being of the opinion that the Amended Complaint was deficient in various respects, the aforesaid Defendant filed a Joint Motion to Dismiss Amended Complaint and/or For a More Definite Statement. This Brief is filed in support thereof.

II. STATEMENT OF ISSUES INVOLVED:

1. Whether Plaintiffs have failed to state claims under the 5th and 14th Amendments where there are adequate remedies under state law.

2. Whether Plaintiffs have failed to state the basis of a § 1983 claim against Defendant Ernico and his law firm where their role was

merely to provide advice and counsel but not to make policy or decisions.

3. Whether Plaintiffs' conspiracy claim must fail because it lacks the requisite specificity, and because the underlying claim upon which it is based is not justiciable.

4. Whether Plaintiffs' claims for punitive damages against Defendant Middle Paxton Township and the Defendant Supervisors in their official capacities should be dismissed.

5. Whether all of the individual Defendants are entitled to qualified immunity, and therefore dismissal of the action as to them, where the Plaintiffs have failed to allege that their conduct has violated clearly established constitutional law.

6. Whether, in the alternative, Plaintiffs should be required to file a more definite statement of the claims against the Defendants.

III. LEGAL DISCUSSION:

A. Plaintiffs have failed to state a claim upon which relief can be granted under the 5th and 14th Amendments because there are adequate remedies under state law.

Plaintiffs assert a § 1983 theory based upon an alleged denial of procedural due process as it relates to their attempts to develop a 10-lot subdivision.

As stated in Defendants' brief in support of their motion to dismiss Plaintiff's original Complaint, the courts have held that aggrieved parties, such as the Plaintiffs perceive themselves to be, cannot assert a direct claim

against actors such as the Defendants herein under either the 5th or 14th Amendments to the United States Constitution. The sole method to pursue such claims is pursuant to 42 U.S.C.A. § 1983.

> The Supreme Court has never held that there is an implied private right of action against a state, or a state actor, under the Fourteenth Amendment. The Supreme Court has enunciated an implied right of action under the Fourth and Fifth Amendments, but has gone no further. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) (Fourth Amendment implied right of action); *Davis v. Passman,* 442 U.S. 228, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979) (Fifth Amendment implied right of action). The Court need not break new legal ground by deciding whether there is an implied right of action under the Fourteenth Amendment because 28 U.S.C. § 1983 provides a remedy for violations of these rights. "Bivens teaches that the existence of an effective and substantial federal statutory remedy for the plaintiffs obviates the need to imply a constitutional remedy on [his] behalf." *Rogin v. Bensalem Twp.,* 616 F.2d 680, 686 (3rd Cir. 1980), *cert. denied sub nom, Mark-Gardner Assocs., Inc. v. Bensalem Twp.,* 450 U.S. 1029, 68 L.Ed.2d 223, 101 S.Ct. 1737 (1981). Accordingly, plaintiffs' first theory does not present a cause of action upon which relief can be granted.

Hammond v. Creative Financial Planning Organization, Inc., 800 F. Supp. 1244 (E.D. Pa. 1992). *See also Reynolds v. Wagner,* 936 F. Supp. 1216, 1223, n.4 (E.D. Pa. 1996).

Although some cases have suggested that a direct cause of action may exist under the Fifth Amendment,

those cases have limited direct causes of action under that Amendment to claims against federal officials. *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971); *Davis v. Passman*, 442 U.S. 228 (1979). In addition, courts have also specified that the Fifth Amendment does not provide a direct cause of action under the just compensation clause. *Evans v. Washington County,* 1999 U.S. Dist. Lexis 20036 (D. Ore. 1999) at slip op. 2, n. 2. Furthermore, the Fifth Amendment is only applicable to the states and local municipalities through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, (1980); *Quality Refrigerated Services, Inc. v. City of Spenser,* 908 F. Supp. 1471 (N.D. Iowa 1995).

To the extent that the claim under Count I of the Amended Complaint asserts, *inter alia*, a cause of action under 42 U.S.C.A. § 1983, such claim is legally deficient. The Plaintiffs have adequate remedies as landowners and potential developers under state law to address the issues raised in the Amended Complaint, and they have failed to allege that such remedies are inadequate.

> It is the law in this Circuit that a state provides adequate due process when it provides "reasonable remedies to rectify a legal error by a local administrative body." Pennsylvania clearly provides such remedies . . . and therefore plaintiffs' [sic] have no justifiable due process claim.

Bello v. Walker, 840 F.2d 1124 at 1128 (CA 3d 1988).

> In Pennsylvania the procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court, ... Pennsylvania's system of adjudicating zoning challenges appears to be

> consistent with the requirements of due process. . .

Rogin v. Bensalem Township, 616 F2d 680 at 695 (CA 3d 1980). Plaintiffs have failed to set forth any behavioral or structural allegations from which the Court can infer that the process was unconstitutional.

For these reasons, Count I of the amended Complaint should be dismissed.

B. Plaintiffs have failed to state the basis of a § 1983 claim against Defendant Ernico and his law firm where their role, as solicitor to the Township, was merely to provide advice and counsel but not to make policy or decisions.

Defendant Jeffrey Ernico was the solicitor for Middle Paxton Township during the time period relevant to Plaintiffs' claims. Mr. Ernico was, and is, a partner in the law firm of Mette, Evans & Woodside, P.C.

The duties of a solicitor relative to a second class township, such as Middle Paxton Township, are set forth in 53 P.S. § 66103. The solicitor acts solely as the legal advisor to the board of supervisors; he has no legal authority to enact legislation or to make executive or administrative decisions. The solicitor may only act pursuant to the board of supervisors' authorization. A municipal solicitor is neither a "public employee" or a "public official" within the scope of the Ethics Act. *Ballou v. State Ethics Commission,* 496 Pa. 127, 436 A.2d 186 (1981).

The *Ballou* opinion contained the following quote regarding the position of a county solicitor:

> No functions of government are delegated to him. Nor can he lawfully exercise any powers of sovereignty. He serves as counsel to the commissioners in the discharge of their public duty just as any privately employed attorney serves his clients. His duties are to advise the commissioners and to represent the county in litigation authorized by them or instituted against the county.
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> His duties are important in the sense that the advice and actions of an attorney always entail grave responsibility; but they are performed for the board. He has no direct connection with, or responsibility to, the public; he is entirely subordinate to the board; they may follow his advice or disregard it; he cannot control their actions; he cannot perform their duties; his appointment is for no definite term, and he can be recalled at any time; he has no grave and important duties involving a function of government in their performance. . . .

Ballou, supra, 436 A.2d at 189-190.

Mr. Ernico is not a township official and, therefore, did not act at any time relevant to Plaintiffs' claims under color of state or local law, nor did his conduct constitute state action. Therefore, he and his law firm are not proper parties to the present matter.

The Court's attention is also directed to *Pacelli v. deVito*, 972 F.2d 871 (CA 7th 1992) and *Arnold v. Dvoskin*, 90 Civ. 4448 (E.D. N.Y. 1993) which held that an agency attorney cannot be liable under § 1983 for merely providing legal advice.

For these reasons, the Amended Complaint should be dismissed as to Defendant Jeffrey A. Ernico, Esquire and Defendant Mette, Evans & Woodside, P.C.

C. Plaintiffs' conspiracy claim must fail because it lacks the requisite specificity and because the underlying claim upon which it is based is not justiciable.

Count II of the Amended Complaint purports to set forth a claim for civil conspiracy to violate the Plaintiffs' federally protected rights. However, this claim is couched in nothing more than conclusory language and is wholly void of the requisite specificity required to set forth a cognizable claim of conspiracy in a civil rights context.

To show a conspiracy there must be evidence of (1) an actual violation of a right protected under § 1983 and (2) actions taken in concert by the defendants with the *specific intent* to violate such right. There must be an agreement or an understanding to deprive the plaintiff of his or her constitutional rights. *Williams v. Fedor*, 69 F.Supp. 649 at 665 (M.D. Pa. 1999).

Complaints in civil rights actions must be pleaded with factual specificity. *Hall v. Pennsylvania State Police,* 570 F2d 86 (CA 3d 1978); *United States v. City of Philadelphia,* 482 F. Supp. 1274 (E.D. Pa. 1979). Vague and conclusory allegations will not survive a motion to dismiss. *Id.* The purpose of the specificity requirement is to assure that civil rights actions are not frivolously brought and to enable the court to assess whether the action may be meritorious. *Shirey v. Bensalem Township,* 501 F. Supp. 1138 at 1141 (E.D. Pa. 1980).

The same requirement of factual specificity is no less true for civil rights claims based upon an alleged conspiracy. It is a longstanding rule in the Third Circuit that a mere general allegation of conspiracy is insufficient. *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 595 F.Supp. 1385 at 1400 (D.Del. 1984), aff'd 769 F.2d 152 (CA 3d 1985).

> Numerous circuit courts have held that a conspiracy can be the basis of a § 1983 action, *but conclusory allegations of a conspiracy cannot withstand a motion to dismiss.* (emphasis added)

Shirey v. Bensalem Township, 501 F. Supp. 1138 at 1141 (E.D. Pa. 1980).

> The plaintiffs must plead with particularity the "circumstances" of the alleged wrong doing in order to place the defendants on notice of the precise misconduct with which they are charged. Only allegations of conspiracy which are particularized, such as those addressing (1) the period of the conspiracy, (2) the object of the conspiracy, and (3) certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient.

Loftus v. SEPTA, 843 F. Supp. 981 at 986 (E.D. Pa. 1994); *Labalokie v. CAIU*, 926 F. Supp. 503 at 508-509 (MD. Pa. 1996)

The allegations of conspiracy must be of such sufficiency as to describe the general composition of the conspiracy, some or all of its broad objectives, and a defendant's general role in that conspiracy. *Alfaro v. E.F. Hutton & Co.,* 606 F. Supp. 1100 (E.D. Pa. 1985). An inference of conspiracy from the pleading is no substitute

for the requirement that the circumstances of the conspiracy be pleaded with specificity. *Kalmanovitz,* supra.

Here the Plaintiffs have failed to identify the acts of the various Defendants which might arguably constitute a conspiracy. Rather, the Plaintiffs "lump" all of the Defendants together as a single unit in their conspiracy theory without identifying the specific actions of each of the alleged conspirators. The necessity of articulating the acts of each conspirator becomes particularly critical in circumstances such as those presented in this case where not all of the Defendants share the same legal authority to undertake acts that might deprive the Plaintiffs of their rights. For example, Defendant Mary Jane Davis, as Township Enforcement Officer, does not have any legal authority to approve or disapprove subdivision applications, such authority being vested solely in the Board of Supervisors.

Moreover, if the Amended Complaint fails to state a cause of action for a § 1983 claim, as argued above, then the cause of action based upon an alleged conspiracy to violate the Plaintiffs' federally protected rights must fail. There can be no actionable conspiracy to commit an act if the act itself is not justiciable.

For these reasons Count II of the Amended Complaint should be dismissed.

D. Plaintiffs' claims for punitive damages against Middle Paxton Township and the Township Supervisors in their official capacities must be dismissed.

The case law with respect to this issue was clearly established by the United States Supreme Court in the

case of *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981). No basis exists upon which Plaintiffs' claims in this regard should be permitted to proceed. Punitive damages may only be recovered against local officials in their individual capacities. Moreover, since a claim against a public official in his official capacity is the same as a claim against the entity, punitive damages are not available against a municipal official acting in that official capacity. *Bourque v. Town of Bow*, 736 F. Supp. 398 (D.N.H. 1990). Accordingly, Defendants request that Plaintiffs' claims for punitive damages against Middle Paxton Township and the individual Middle Paxton Township Defendants in their official capacities be dismissed.

E. The Individual Defendants are entitled to qualified immunity and dismissal of the action against them where Plaintiffs have failed to allege that the conduct of the individual Defendants has violated clearly established constitutional law.

State and local officials who carry out executive and administrative functions, in contrast to legislative functions, may assert the defense of qualified immunity. In land use cases, the enactment, amendment or repeal of zoning and subdivision ordinances has been regarded as legislative in nature. On the other hand, rulings on various applications for approvals, variances, conditional uses, etc. have been regarded as executive in nature. *Botton v. Marple Twp.*, 689 F. Supp. 477 (E.D. Pa. 1988).

In 1982 the Supreme Court established the governing test for qualified immunity, namely, whether the official violated clearly established federal law. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed. 2d 396 (1982).

Specifically, public officials who carry out executive and administrative functions are protected from personal monetary liability so long as their actions do not violate "clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Harlow*, supra, 457 U.S. at 818. This standard, which turns on the "objective legal reasonableness" of the official [*Harlow*, supra, 457 U.S. at 819], protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335 at 341, 106 S.Ct. 1092, 89 L.Ed. 2d 271 (1986).

Qualified immunity applies in cases involving claims against public officials in their individual capacities; it does not apply to official capacity claims because such claims are the equivalent of a claim against the governmental entity on whose behalf the official is acting. The purposes of qualified immunity is to protect public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, supra, 457 U.S. at 806.

The Amended Complaint does not allege that the individual Defendants are *not* entitled to qualified immunity, nor does it allege that the individual Defendants violated clearly established federal law. In the absence of such allegations, the individual Defendants are entitled to qualified immunity and the Amended Complaint should be dismissed as to such Defendants. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985); *Siegert v. Gilley,* 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed. 2d 277 (1991).

F. In the alternative, Plaintiffs should be required to file a more definite statement of the claims against Defendants since the allegations are vague, conclusory and ambiguous, and they fail to differentiate the acts and/or omissions of each Defendant.

As previously discussed herein, a complaint alleging a civil rights violation must be pleaded with some degree of specificity, and certainly in terms that are not vague, conclusory and/or ambiguous.

A more definite statement is necessary to permit Defendants to properly respond to the Amended Complaint in that Plaintiffs fail to articulate and differentiate between the actions or omissions of each of the Defendants. Not all of the individual Defendants are of the same legal stature, nor do they have the same authority and powers as it relates to the proposed development of the Plaintiffs' land. For example, where the Enforcement Officer may have the authority to issue building permits, the Township Supervisors do not. On the other hand, the Supervisors have the authority to approve subdivision plans which the Enforcement Officer does not. The Plaintiffs should be required to frame a pleading which addresses the acts or omissions of each Defendant or related groups of Defendants, as opposed to lumping them all together as if they were interchangeable parts.

Furthermore, Plaintiffs fail to set forth their causes of actions in separate counts. These failures make the Complaint vague and ambiguous. In addition, Defendants are not able to respond to the allegations against each of them. These deficiencies in the Plaintiffs' Amended Complaint are substantial and Plaintiffs should be directed to file a more definite statement of the facts, if any exist,

which form the basis of their claims against the Defendants.

Respectfully submitted

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CERTIFICATE OF SERVICE

AND NOW, I, C. KENT PRICE, ESQUIRE, for the firm of THOMAS, THOMAS & HAFER, LLP, attorneys for Defendants J. Thomas Van Wagner, Jeffrey Smith, Richard Peffer, Middle Paxton Township and Mary Jane Davis, hereby certify that I have this day served the within Brief in Support of Joint Motion to Dismiss Amended Complaint and/or for a More Definite Statement by depositing a copy of the same in the United States Mail, postage prepaid, at Harrisburg, Pennsylvania, addressed to:

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